STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MELINDA TORRES, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA (SAN FRANCISCO), Respondent.	Case No. SF-CE-939-H PERB Decision No. 2370-H April 18, 2014

Appearances: Paula Gustafson, Attorney, for Melinda Torres; Kathryn M. Mente, Labor Relations Advocate, for Regents of the University of California (San Francisco).

Before Huguenin, Winslow and Banks, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Melinda Torres (Torres) to the proposed decision (attached) of an administrative law judge (ALJ). The ALJ determined that the Regents of the University of California (San Francisco) (UCSF or University) did not violate section 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA)[1] by discriminating against Torres or interfering with her because of her exercise of rights protected under HEERA.

The Board has reviewed the entire record in this case, including the complaint, the hearing record, the ALJ's findings of fact and conclusions of law, Torres' exceptions and UCSF's response thereto. The ALJ's proposed decision is well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, the Board adopts

[1] HEERA is codified at Government Code section 3560 et seq.

the ALJ's proposed decision as the decision of the Board itself subject to our discussion below of Torres' exceptions.

PROCEDURAL HISTORY

On April 12, 2010, Torres filed an unfair practice charge with PERB's Office of the General Counsel. Torres alleged that UCSF discriminated against her by: (1) unilaterally placing her in a position which radically deviated from the one she previously held, and (2) making this assignment with intent to cause her harm. Torres also alleged that the assignment interfered with her rights to process her grievance by unilaterally assigning her to an unsuitable position at Step 2 of her grievance and by withholding information necessary to process her grievance. On May 21, 2010, UCSF filed its position statement denying any wrongdoing and contending that Torres had failed to allege a prima facie case of discrimination, interference or unilateral change in working conditions. UCSF urged that no complaint be issued. On May 24, 2010, Torres filed her first amended charge alleging that her assignment to a second position by UCSF also discriminated against her and interfered with her HEERA protected rights. UCSF filed its second position statement on June 25, 2010 denying any wrongdoing, contending that Torres failed to state a prima facie case and urging that no complaint be issued.

On June 29, 2010, the Office of the General Counsel issued a letter warning Torres that individual employees did not have standing to allege unilateral change violations and that her charge, as presently written, did not state a prima facie case of discrimination or retaliation. Torres filed a second amended charge on October 20, 2010, which supplied further factual allegations that UCSF discriminated against her and interfered with her HEERA protected rights by its unilateral assignments of Torres to unsuitable positions in October and November of 2009. On November 5, 2010, UCSF filed its response reiterating its position that Torres had

failed to state a prima facie case for discrimination or interference and denying that it had unilaterally changed Torres' working conditions.

On October 18, 2011, the Office of the General Counsel issued a complaint alleging that UCSF discriminated against Torres on October 2, 2009, when it assigned her to an administrative assistant III position and on November 24, 2009, when it assigned her to a research assistant III (AKA "(__) Assistant III")[2] position. The assignment to the administrative assistant III position was also alleged to have interfered with Torres' rights guaranteed by HEERA, since it precluded further processing of her grievance. Also on October 18, 2011, the Office of the General Counsel dismissed Torres' unilateral change allegations. On November 7, 2011, UCSF filed its answer, denying all allegations and asserting several defenses.

An informal conference was scheduled for December 7, 2011, but the parties did not resolve the matter and a formal hearing was scheduled for June 13-15, 2012 in Oakland. At hearing, Torres stipulated to the withdrawal of her interference charges. UCSF filed its closing statement on August 31, 2012 and Torres filed her post-hearing brief on September 5, 2012. On October 4, 2012, the ALJ issued his proposed decision in the matter.

After being granted an extension of time to file her appeal, Torres submitted her statement of exceptions to PERB's Appeals Office on November 12, 2012. UCSF filed its opposition on December 6, 2012. PERB's Appeals Assistant notified the parties that the filings were complete on December 10, 2012.

[2] "(__) Assistant" is a generic term used to classify temporary appointees who fill in for various clerical and administrative support positions with more specific functions at UCSF: such as "Administrative Assistant," "Payroll Assistant," "Research Assistant," etc.

FACTUAL SUMMARY

Career and Limited Appointments

UCSF and the Coalition of University Employees (CUE) are parties to a labor agreement (Agreement) for a bargaining unit called the clerical and allied services unit (Clerical Unit). Article 28 of the Agreement "POSITIONS/APPOINTMENTS" defines the several types of positions or appointments available for the clerical unit. "Career" appointments "are established for a fixed or variable percentage of time at 50 percent or more of full-time and are expected to continue for one year or longer." (Agreement, Art. 28 section A.1.) Career appointments may also be established by conversion from a "limited" appointment pursuant to Article 28, section B.2 of the Agreement. A limited appointment is described as one in which "the appointee is expected to be on pay status for less than one thousand (1,000) hours in a rolling 12-month period." (Agreement, Art. 28 section B.1.) If a limited appointee reaches 1,000 hours during the 12-month period without a break in service of at least 120 days, the appointment automatically converts to a career appointment. (Agreement, Art. 28 section B.2.) There are two exceptions to this rule: where the limited appointee is hired to replace an employee on leave that exceeds 1,000 hours and where the limited appointee is hired for a position that is not "ongoing." (Agreement, Art. 28 section B.5.) While limited appointees are at-will employees, UCSF may not terminate them merely to avoid granting them career status. (Agreement, Art. 28 section B.4.)

Temporary Employment Program

Article 28 also defines the temporary employment program (TEP). The stated goal of the TEP is to:

> [P]rovide immediate administrative and technical support services to the University departments. Departments utilize TEP employees to complete special projects, to respond to work load fluctuations that are unusual or episodic in nature, to fill in for

> employees who are on leave or to fill in during a recruitment period . . . . A second goal is to provide the campus/laboratory/ hospital with a viable source of candidates for its career and limited appointments.

(Agreement, Art. 28 section E.1.) TEP employees are appointed to "floater" appointments. Floater appointments may last as long as 36 months. Floater appointees may also achieve career status if their appointment exceeds 1,500 hours during their 36-month appointment. (Agreement, Art. 28 section E.3.) UCSF's departments are not obligated to fill temporary assignments through TEP and can fill their positions through outside employment agencies.

Torres' Employment with UCSF

Torres was appointed to the TEP as a floater on February 9, 2007. Her appointment was scheduled to end on February 9, 2010. She was classified as a (__) assistant II based on a skills assessment test administered by UCSF. (__) assistants are appointed to various clerical and administrative support positions in UCSF's departments which include the term "assistant": such as, administrative assistant, payroll assistant, research assistant, etc. There are three levels of (__) assistants: (__) assistant I being an entry level position and (__) assistant III being the most advanced and encompassing the broadest range of functions.

During Torres' first 14 months as a floater she received several (__) assistant appointments mostly at the (__) assistant II level, but also some at the higher or lower assistant levels. On or about August 25, 2008, Torres received an appointment as a temporary administrative assistant III in the coding unit of UCSF's pediatrics department. Her appointment with the coding unit was scheduled to end on May 21, 2009.

Sometime in May of 2009, the Human Resources Manager for UCSF's Department of Pediatrics, Amy Tom (Tom), was informed by Torres' Supervisor, Carol Yarbrough (Yarbrough), that Torres was approaching the 1,500 hour limit which, if exceeded, would convert her into a career appointment. At the time, there was still several months' worth of

work to do on the coding project Torres was working on. Tom determined UCSF's two options were to either terminate Torres and find another TEP employee, or to terminate Torres and rehire her through an outside employment agency. Tom sent Torres an e-mail referring her to an outside employment agency authorized by UCSF to supply it with temporary employees. Tom believed that by doing so, it would create a break in service and Torres would not convert to a career position. On May 21, 2009, Torres' TEP appointment with the coding unit ended. Torres returned the next day, May 22, 2009, as an employee of the employment agency.

Grievance

On June 22, 2009, Torres filed a grievance alleging she had worked in the same assignment, in the same department, doing the same work for more than 1,500 hours within a 24-month period as a floater appointee. The grievance requested that Torres be reinstated to the same pay, benefits and rights lost due to UCSF's alleged contract violation. Torres identified her classification as "Administrative Assistant III." On July 6, 2009, UCSF's Step One Grievance Officer, Jocelyn Nakashige (Nakashige), denied Torres' grievance on the basis that Torres' had been appointed to 2 separate and distinct temporary assignments, performing different work. Therefore, according to Nakashige, UCSF had not violated Article 28.E.2(e)(3) which required 1,500 hours in one assignment.

Torres appealed the grievance to Step 2. On October 2, 2009, Mark Gottas (Gottas), UCSF's Step 2 grievance officer, granted Torres' remedy, converting her to career status effective May 22, 2009 in an administrative assistant III position in the department of pediatrics, though not in the coding unit because there were no permanent positions available in that unit. The Step 2 grievance response issued by Gottas informed Torres that she would be informed when to return to the department, what position she would be in and whom to report to.

On October 9, 2009, Tom wrote to Torres to inform her that her new appointment would be as a (__) administrative assistant III in the Department of Pediatrics— Division of General Pediatrics, with a start date of October 26, 2009, and that she would report to Doctor Michael Cabana (Cabana), the division chief. Tom's letter included a job description for a vacant administrative assistant III position in the division of general pediatrics. Torres' Attorney, Paula Gustafson (Gustafson), disputed the appointment immediately. Gustafson insisted that Torres—whose first language is not English and who did not possess a high degree of English proficiency—was not qualified to perform the work described in the job description. Gustafson accused UCSF of making the appointment in bad faith and setting her client up for failure. Nevertheless, on October 26, 2009, Torres reported for an orientation with Cabana. On October 27, 2009, Tom wrote to Torres telling her that she had been told that Torres had rejected the appointment, which she considered a resignation under Article 32 of the Agreement. Tom gave Torres until October 28, 2009, to contact her or UCSF would effectuate her resignation. In a series of e-mails between Gottas and Gustafson, dated October 28 and 29, 2009, it was agreed that Torres' resignation would be rescinded and that the appointment with Cabana would be kept open for Torres while the grievance was processed further. Nevertheless, Torres filed a second grievance on November 2, 2009, alleging that UCSF's remedy for her first grievance violated the Agreement.

On November 17, 2009, UCSF issued its Step 3 response to Torres' first grievance affirming Gottas' Step 2 response and resolution and finding no violation of the Agreement by UCSF. On December 4, 2009, Tom sent Torres a letter confirming her appointment as a (__) administrative assistant III in the Department of Pediatrics at San Francisco General Hospital with a start date of December 8, 2009. The letter informed Torres that she would report directly to Doctor Delia Dempsey (Dempsey) and included a job description for a

(__) assistant III. Torres' position with Dempsey would be as a research assistant and had an end date of June 30, 2010. On December 8, 2009, Torres reported for work at San Francisco General Hospital. On that same day, Torres informed the department that she would not accept the appointment. On December 17, 2009, Tom wrote to Torres informing her that UCSF concluded that she had voluntarily resigned from employment.

PROPOSED DECISION

On October 4, 2012, the ALJ issued his proposed decision. The ALJ framed the issue thusly:

> Did the University discriminate against Torres by failing to offer her a career position in the Department of Pediatrics performing the same duties she performed as a temporary employee?

(Proposed Dec., p. 14.) The ALJ identified the elements of a prima facie case of discrimination as: (1) the employee engaged in protected activity; (2) the employer knew of the protected activity; (3) the employer took an adverse action; and (4) the protected activity was a motivating factor in the employer's decision to impose the adverse action. (*See Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).) The ALJ stated that once a prima facie case of discrimination was established, the burden of persuasion shifted to the employer to demonstrate that it would have taken the same action even in the absence of protected activity. (Proposed Dec., p. 14.)

Applying the *Novato, supra,* PERB Decision No. 210 test, the ALJ found that Torres engaged in HEERA protected activity by filing grievances on June 18 and November 2, 2009, and that UCSF's decision makers (Gottas and Tom) had knowledge of those grievances. However, the ALJ found that the assignments offered to Torres did not constitute adverse actions "under the particular facts of this case because Torres had no reasonable expectation of continued employment in the Coding Unit." (Proposed Dec., p. 17.) In addition, the ALJ

found that even if the new assignments constituted adverse actions because they "imposed more onerous working conditions," Torres had failed to establish a nexus between her protected activity and the new job assignments. (Proposed Dec., pp. 17-18.)

TORRES' EXCEPTIONS

Torres takes seventy-four (74) exceptions to the ALJ's proposed decision. Fifty-two (52) of those exceptions are to the ALJ's factual findings. One (1) exception is to the ALJ's statement of the issue and twenty-one (21) exceptions are to the ALJ's conclusions of law.

UCSF argues that Torres' exceptions fail to meet the requirements of PERB Regulation 32300[3] because Torres did not file a supporting brief that states the specific issues of procedure, fact, law or rationale to which exception is taken. According to UCSF, Torres' failure to adhere to the requirements of PERB Regulation 32300 has made it impossible to file

[3] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32300(a) states:

> A party may file with the Board itself an original and five copies of a statement of exceptions to a Board agent's proposed decision issued pursuant to Section 32215, and supporting brief, within 20 days following the date of service of the decision or as provided in section 32310. The statement of exceptions and briefs shall be filed with the Board itself in the headquarters office. Service and proof of service of the statement and brief pursuant to Section 32140 are required. The statement of exceptions or brief shall:
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> (1) State the specific issues of procedure, fact, law or rationale to which each exception is taken;
>
> (2) Identify the page or part of the decision to which each exception is taken;
>
> (3) Designate by page citation or exhibit number the portions of the record, if any, relied upon for each exception;
>
> (4) State the grounds for each exception.

a response of substance. As a general objection, UCSF maintains that Torres' exceptions are merely an attempt to reargue her facts or introduce facts she failed to produce at hearing.

DISCUSSION

PERB Regulation 32300

A party who wishes to challenge a Board agent's proposed decision may file exceptions pursuant to PERB Regulation 32300. While the form that the exceptions take may vary—a party may file a statement of exceptions, a brief or both—the content of those exceptions is clearly delineated. Thus, we do not agree with UCSF that Torres was required to file a supporting brief along with her statement of exceptions, since the regulation, by its very terms, allows the filing of either a statement or a brief or both. However, we do conclude that Torres' exceptions do not comply with PERB Regulation 32300, since they invariably fail adequately to identify the page or part of the decision to which the exception was taken.

Moreover, we conclude that three (3) of Torres' exceptions warrant discussion, while the other seventy-one (71) exceptions either lack merit or would not affect the Board's decision in this matter and are hereby denied.

The Merits of Torres' Grievance

Torres takes exception to the ALJ's description of the events that occurred after the Step 2 meeting for Torres' first grievance. According to the ALJ:

> Following the meeting, Gottas investigated further with Yarbrough and De Angelis and learned that Torres' tasks had indeed changed from coding work related to reconciliation to updating data bases. However, Gottas did not find evidence to substantiate Nakashige's analysis of the case. Gottas understood that there was a decision to bring Torres back through the temporary agency. The department had intended to terminate Torres at some time because the assignment was not permanent, but accommodated Torres' request to stay on. Though it was unclear to Gottas whether Torres' work assignment was primarily coding or database work, Gottas ultimately concluded there was sufficient evidence of a default conversion under the language of

> Article 28's 1500 hour rule. He believed a remedy should be offered to resolve the grievance.

(Proposed Dec., p. 10.) Torres excepts to this paragraph on the ground that the ALJ improperly determined the merits of Torres' grievance. We conclude that the ALJ did not rule on the merits of Torres' grievance but merely described the events that occurred after Torres' Step 2 meeting based on evidence that was presented at hearing and found credible by the ALJ. Torres points to no evidence sufficient to overturn the ALJ's finding regarding Gottas' motivation, and as we find none in the record, this exception is denied.

Torres' Hearsay Exception

Torres takes exception to the ALJ's finding that

> Gottas testified without contradiction that Torres' CUE representative agreed that nothing more was required by the express language of Article 28.

(Proposed Dec., p. 10.) Torres' attorney twice objected to Gottas' testimony regarding what he was told by the CUE Representative Mary Higgins (Higgins) on the grounds that it was hearsay. PERB Regulation 32176 does not require that PERB's hearings be conducted in compliance with the technical rules of evidence applied in California courts. With regard to hearsay, PERB Regulation 32176 specifically states:

> Hearsay evidence is admissible but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

In a civil action, the hearsay rule excludes statements made by an out-of-court declarant when offered to prove the truth of the matter asserted by those statements. (1 *Witkin, Cal. Evidence* (5th ed. 2012) Hearsay, § 5, p. 788.) The essence of the hearsay rule is that the declarant is not at the tribunal and subject to cross-examination and is not available for the trier of fact to assess his or her credibility. (See *People v. Bob* (1946) 29 Cal.2d 321, 325.) Thus, the evidence that the CUE representative agreed that Gottas' Step 2 remedy complied with the

terms of Article 28 would be inadmissible in a civil action unless subject to one or more of the exceptions to the hearsay rule.

At hearing, the ALJ ruled that Gottas' hearsay statement was admissible as a "party admission." Torres argues that this constituted prejudicial error by the ALJ, because CUE was not a party to the action as required under California Evidence Code section 1220.[4] The key issue is whether or not CUE was a party in this action. In the original unfair practice charge filed on April 12, 2010, the charging party is identified as Melinda Torres and the respondent is identified as the Regents of the University of California. CUE is not mentioned as a party. In addition, in the partial dismissal letter dated October 18, 2011, the Office of the General Counsel dismissed Torres' allegations that UCSF had implemented a unilateral change in working conditions specifically for the reason that Torres, as an individual employee, did not have standing to allege a unilateral change violation nor allege violations of sections of the government code which protect the collective bargaining rights of employee organizations. Thus, it is clear that CUE was not a party to this action and the hearsay exception for admissions by a party did not apply.

Nevertheless, Gottas' hearsay statement is admissible not for its truth, but to demonstrate his state of mind. (Cal. Evid. Code, § 1250.)[5] Therefore the statement is

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[4] California Evidence Code section 1220:

> Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.

[5] California Evidence Code section 1250:

> (a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design,

admissible to show that Gottas believed he was interpreting Article 28 in accordance with the Agreement and consistent with CUE's interpretation, though it cannot be admitted to prove that CUE agreed with his interpretation. Since Torres has alleged that UCSF granted the remedy at Step 2 in retaliation for her protected activity, Gottas' state of mind in granting the remedy becomes an issue.

According to Torres' exception:

> the actual statements attributed to Higgins are not inconsistent with Torres's position in this case and, even more important, the statements upon scrutiny do not support Judge Ginoza's statement "that Torres was only entitled to convert to a career position in the same department and in the classification in which she was last working."

(Torres' Exceptions, p. 24.) The statement quoted in Torres' exception is the ALJ's finding regarding Gottas' belief about what Torres was entitled to as a remedy for her grievance. This finding was based on Gottas' testimony about UCSF's past practice in conversions to a career appointment. We find, along with the ALJ, that the quoted passage accurately reflects Gottas' belief about the proper remedy for Torres' grievance. The hearsay testimony about Gottas' conversation with the CUE representative further supports a finding that Gottas believed he acted in compliance with Article 28. Since the ALJ's finding was not solely based on hearsay

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> mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when:
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> (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or
>
> (2) The evidence is offered to prove or explain acts or conduct of the declarant.
>
> (b) This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed.

testimony but also on Gottas' direct testimony, we conclude that the ALJ's ruling complied with PERB Regulation 32176.

Moreover, while Torres claims that the ALJ's finding is prejudicial, she does not explain how it is so. Unions often do not agree with an employer's interpretation of an agreement. In itself, that disagreement does not establish any of the elements of Torres' prima facie case. Torres had to prove that she engaged in protected activity and that the University knew about it. The ALJ determined that she had proved these two elements of her prima facie case and, in any event, UCSF conceded those two elements.

Torres also had to prove that the actions taken by the University were adverse. The ALJ determined that she failed to do so, on the basis that she was not entitled to the position she demanded, and that she refused the positions that the University offered as a settlement. Torres claims that the University's offer of (__) assistant II appointments was adverse by comparison to her prior position. We concur with the ALJ that, in making the adverse action determination here, Torres' administrative assistant III position with the coding unit could not provide the basis for comparison with the two (__) assistant II appointments offered by UCSF in settlement of the grievance. Torres was no longer working in the coding unit appointment when UCSF offered her the other two appointments, and she failed to demonstrate that the coding unit position still existed at the time UCSF offered her the other two appointments. While UCSF may have been obligated to offer Torres the same appointment in which she had attained career status, if that appointment still existed, the University was not obligated to create a position that no longer existed and for which it had no funding in order to settle Torres' grievance. Viewed in this light, the appropriate comparison in determining whether UCSF's actions were adverse would be between the two (__) assistant II appointments offered by UCSF and no appointment at all (i.e., lay-off), in which case the UCSF's settlement offer

was not adverse. We also concur with the ALJ's determination that a constructive discharge theory was inapplicable here, since Torres declined the positions offered by UCSF. (*Visalia Unified School District* (2004) PERB Decision No. 1687, adopting Proposed Dec., pp. 29-31 [constructive discharge requires more than prospect of onerous work conditions or fear of retaliatory action].)

The ALJ also determined that even if the University's actions were adverse, Torres had failed to prove that there was a nexus between her protected activity and the adverse action. We concur. Torres offers no direct or persuasive circumstantial evidence to support her claim that the University's offer of two positions, which she declined, evidenced unlawful motive.

In sum, Torres has failed to demonstrate how the ALJ's finding which she challenges as hearsay prejudiced his determination that she failed to prove up all the elements of a prima facie case of retaliation. Therefore, we deny Torres' exception on the ground that it does not affect our decision in this matter.

Torres' Burden Shifting Exception

Torres takes exception to the ALJ's conclusion that:

> Torres believed, but offered no proof that there was a career position available in the Coding Unit or even a (__) assistant I or II available in the department. I find that the offers did not constitute adverse actions under the particular facts of this case because Torres had no reasonable expectation of continued employment in the Coding Unit.

(Proposed Dec., p. 17.) According to Torres, this conclusion impermissibly shifts the burden of proof to Torres. Whether or not the two assignments offered by UCSF were adverse to Torres was part of the prima facie case that Torres herself had the burden of proving. The issue of UCSF's affirmative defense to Torres' claim of retaliation was never addressed because Torres failed to prove up a prima facie case. Hence, the burden never shifted to UCSF. (*Novato, supra,* PERB Decision No. 210; *Martori Brothers Distributors v.*

Agricultural Labor Relations Board (1981) 29 Cal.3d 721; *Wright Line* (1980) 251 NLRB 1083.) We therefore deny Torres' exception that the ALJ impermissibly shifted the burden of proof onto her.

Lastly, having found no unfair practice violation in this case, we do not opine as to what status, if any, Torres attained when she returned to the coding unit as the employee of an outside employment agency and thereafter surpassed 1,500 hours of service. This determination is for the parties pursuant to the dispute resolution procedures in their collective agreement. (*Regents of the University of California* (2010) PERB Decision No. 2105-H [PERB is prohibited from enforcement of agreements between parties and may only issue a complaint where the breach of the agreement also constitutes an unfair practice violation]; *Los Angeles Unified School District* (2009) PERB Decision No. 2073 [PERB has no authority to remedy a breach of contractual grievance procedures unless the breach also constitutes an unfair practice].)

To summarize, having reviewed the record thoroughly, we conclude that there was insufficient non-hearsay evidence for the ALJ to determine that CUE agreed with Gottas' interpretation of Article 28. However, we also conclude that the ALJ's determination with regard to CUE's agreement with Gottas' interpretation did not materially affect the ALJ's resolution of the case. We agree with the ALJ that Torres has failed to establish that UCSF took adverse action by offering her two career assignments in the Pediatrics Department. We also agree with the ALJ that, assuming the jobs offered were adverse, Torres also failed to establish a nexus between her protected activity in filing grievances and those adverse actions.

ORDER

The complaint and underlying unfair practice charge in Case No. SF-CE-939-H are hereby DISMISSED.

Members Winslow and Banks joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

MELINDA TORRES, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA (SAN FRANCISCO), Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-939-H PROPOSED DECISION (October 4, 2012)

Appearances: Paula Gustafson, Attorney, for Melinda Torres; Kathryn M. Mente, Labor Relations Advocate, for Regents of the University of California (San Francisco).

Before Donn Ginoza, Administrative Law Judge.

PROCEDURAL HISTORY

Melinda Torres filed an unfair practice charge against the Regents of the University of California (San Francisco) (University or UCSF) under the Higher Education Employer-Employee Relations Act (HEERA or Act)[1] on April 12, 2010. Amended charges were filed on May 24, and October 20, 2010. On October 18, 2011, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that the University (1) discriminated against Torres by assigning her to an administrative assistant III position in the Department of Pediatrics as a remedy for her grievance, and by assigning her to a research assistant III position at the San Francisco General Hospital after she refused the initial assignment, and (2) interfering with her statutory rights by granting the grievance she

[1] The HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

filed (because it foreclosed her opportunity to process the grievance further). This conduct is alleged to violate section 3571(a).[2]

On November 8, 2011, the University filed an answer to the complaint, denying its material allegations and asserting affirmative defenses.

On December 7, 2011, informal settlement conference was held, but the matter was not resolved.

On June 13, 14 and 15, 2012, a formal hearing was conducted in Oakland by the undersigned. In the course of the hearing, Torres withdrew the interference allegation.

On September 24, 2012, the matter was submitted for decision following receipt of the post-hearing briefs.

FINDINGS OF FACT

Torres is an employee within the meaning of section 3562(e). The University is a higher education employer within the meaning of section 3562(g). The Coalition of University Employees (CUE) is an employee organization within the meaning of section 3562(f)(1) and an exclusive representative within the meaning of section 3562(i). At all times relevant to this matter, Torres was a member of the bargaining unit represented by CUE. The unit includes administrative support workers and is commonly referred to as the clerical unit.

The Temporary Employment Program

The University employs workers in a variety of status categories: career, limited-term, per diem, and temporary "floater." Appointment to a career position obtains the highest level of employment benefits, including the right to a permanent position following successful completion of a probationary period. Applicants for a career position compete in a hiring process that commences with the posting of a vacancy for a specific position as described in

[2] An allegation that the University violated the Act by implementing a unilateral change affecting Torres was dismissed on the same date.

the announcement. Career appointments are of indefinite duration with a minimum of one year. In the UCSF environment, however, some career appointments are in positions with grant funding. When the funding ends, the University will seek to retain the employee by reassigning them to a vacant position, but it may be compelled to lay off the employee if no position can be found. Limited-term appointments are expected to continue for less than 1000 hours in a rolling 12-month period.

The temporary floater appointment arises out of an ongoing pool of temporary employees who receive short-term assignments as needed by the departments. Departments at UCSF are able to obtain short-term employees to complete special projects, respond to workload fluctuations, fill in for regular employees on leave, or fill a vacancy during a recruitment period. A majority of the employees in this Temporary Employment Program (TEP) are members of CUE's bargaining unit, eligible for its negotiated terms and conditions of employment. No other bargaining units participate, though some unrepresented classifications are included. Departments are not obligated to resort to the TEP pool. They sometimes resort to contracting out the work through one of a number of temporary employment agencies approved by the University.

Article 28 ("Positions/Appointments") of CUE's MOU defines the terms of the TEP for unit members. Employees seeking TEP appointments must apply to be on the employment list and undergo a skills assessment. A University human resources analyst reviews the applicant's work history and Word and Excel test scores before making a recommendation as to the classifications for which the employee is eligible to serve as a temporary employee. Under the scoring system used the analyst considers the employee's ability to work independently, scope of responsibility, leadership skills, and management duties. The employee is informed of the

results of the assessment. Eligible employees usually receive a three-year term in the pool upon receipt of their first assignment.

Torres' Employment History in the TEP

Torres' resume indicates a bachelor's degree in management and experience as a store manager prior to working in the TEP. In her resume and application Torres represents that she is proficient in English. However at the hearing, Torres explained that as a Tagalog-speaking immigrant from the Philippines, English is her second language. In her skills assessment, Torres demonstrated only basic proficiency on the Word and Excel tests.

As a result of the University's assessment, the University human resources analyst recommended that Torres be placed in the TEP as a (__) assistant II ("blank assistant II"). The University's departments employ a number of clerical and administrative support positions with the working title "assistant." The (___) assistant title is the generic title used in the formal classification system. The working title includes a descriptor in place of the "blank" that more accurately describes the work in the functional unit, like "administrative," "finance," "payroll," "research" or "medical." The assistant series, or career ladder, has steps at levels I, II, and III. These classifications are all in the CUE unit.

University Senior Compensation Analyst Crystal Morris is the functional manager of the TEP. Morris described (__) assistant I work as entry level work, typically involving word processing and receptionist duties. (__) assistant II work encompasses a broader range of duties, including receptionist work, managing a calendar, and similar functions. (__) assistant IIIs may manage several calendars and engage in some supervisory functions. They are expected to compose and prepare standard letters in response to routine correspondence, have the ability to maintain a high level of organization, and convey information effectively.

A TEP floater has no expectation of offers limited to the classification level determined by the assessment, and indeed as in Torres' case, she received (and accepted) offers for work at all three levels of the (__) assistant classification. A placement may be made at a level higher than the employee's nominal rating. The University's TEP handbook advises employees to only accept those assignments that can be performed successfully. However, there appear to be no significant adverse consequences, because in practice the department simply returns the floater back to the pool if the employee fails to perform. Morris testified that it is not uncommon for departments to complain about the quality of the referrals. Although the TEP request evaluative comments on TEP employees, the departments do not typically respond.

The University appointed Torres as a (__) assistant II in the TEP pool and designated her term of service for three years beginning on February 9, 2007.[3] The University's first assignment given to Torres was as a (___) assistant II. It began on February 21, 2007 and ended on June 30, 2007.

After the initial assignment, Torres received a series of additional assignments over the next 14 months. She received and served in two (__) assistant I positions, six (__) assistant II positions, and one (__) assistant III position. Several of the assignments resulted in an early release. In a general surgery department (__) assistant position in the summer of 2007, Torres failed to pass a test for the patient-scheduling-billing software program. In another position, that summer, the department did not believe Torres was a fit for the position, one which involved heavy telephone duty and other challenges. Later that year in the fall, Torres was released from a position for unspecified reasons. Torres stated that in several instances she was told by the supervisor that she was not a good match.

[3] The contract limits the term of service to 36 months, at which point the floater must take a four-month break in service and reapply to the program.

Despite this, Morris testified that the TEP received no complaints about Torres' work performance, adding that Torres performed "very well" and "successfully completed" her assignments. Based on her review of Torres' record on paper, and specifically as a result of the accumulated experience in her 10 assignments, Morris opined that Torres had the ability to perform day-to-day administrative tasks with minimal supervision. She felt confident Torres could handle a (__) assistant III position, though she would not have placed her in a position demanding the highest level of skill. She conceded that the record did not demonstrate evidence of Torres' ability to prepare and edit correspondence for style and/or subject matter. But Morris contended that she viewed all employees as capable of acquiring skills while on the job so as to progress up the (__) assistant career ladder.

The Conversion Rule

As stipulated in University policy and the CUE MOU, in order to avoid misuse of the floater pool as a source of lower cost labor, the University provides that a floater may not work in that assignment doing the "same work, in the same department" for more than 1500 hours. The MOU also states that use of successive floaters in the same assignment in the same department doing the same work creates an inference that the University's use of floaters violates the policy. Section E.3.c provides that an employee automatically converts to a career appointment after working 1500 hours in one 36-month floater appointment.

As a means of avoiding inadvertent conversion to a career position, it is the University's policy for the TEP to send a notice to the department when the floater is approaching the 1500 hour mark. The MOU does not specify to what position the employee is converted. If the 1500 hour mark is exceeded it is the practice of the University to give the employee a career appointment in a vacant position in the department that requested the

employee, at the same classification level at the time of the overage. If the floater is serving in a vacant and funded position, she converts to that position.

The Coding Unit Assignment

The Pediatrics Department consists of 17 divisions (subspecialties), employing a total of 1500 employees. The department has a central unit handling administrative functions, including finance, accounting, budget, revenue management, human resources, payroll, residency programs and academic affairs. Administrative assistants are employed in all sections of the unit.

In August 2008, Torres received an assignment as a (__) assistant III in the Coding Unit of the department's revenue management division. The majority of Torres' time was spent on "batch reconciliation." She spent a minimal amount of time delivering documents, processing mail, and filing documents. The batch reconciliation work consisted of reviewing the physician's electronic medical records and preparing lists of procedures and tests for a parallel database that would be analyzed by the coders, whose function it is to ensure that billings are authorized and forwarded to the insurer with the correct insurance code. Torres would access another database for the patient's insurance coverage and transfer that information to the coders' lists. She would also review the coders' work to determine if all the entries had been completed. Torres was one of two temporary employees performing this work.

Carol Yarbrough became Torres' supervisor in December 2008. Yarbrough testified that Torres and her coworker in the unit were helping the coders get current in their work. Yarbrough noted that she eventually devised a means of data migration that was more automated, allowing Torres to switch to other tasks. Torres was very reliable and accurate in her work. Yarbrough communicated with Torres by e-mail on a regular basis and found her to communication to be "exemplary." Although the computer tasks themselves were relatively

straightforward, accurate discernment of information and attention to detail were required of the position.

Torres testified that Yarbrough told her to keep quiet and she would receive a career position. She did not identify when Yarbrough made the statement. Yarbrough did not deny making it. Yarbrough did testify that in the spring of 2009 she contemplated creating a new career position that would have assigned some of the front-end work of the coders to a person at an administrative assistant III level. However, it appears the department manager did not accept that proposal.

In May 2009, the Pediatrics Department's human resources manager was Amy Tom. Around this time, Yarbrough informed Tom that Torres was approaching the 1500 hour limit. Tom consulted with the department's management officer, Jackie Jew, and the revenue department manager, Lisa De Angelis. Tom learned that there was no permanent position and the department was considering outsourcing the work. There were however a few additional months of work needed for which there was funding. The decision was made, in part based on Yarbrough's request, to allow Torres to complete that work rather than release her and begin with another untrained temporary employee from the pool. Prior to this, Tom had never encountered a temporary employee approaching the 1500 hour limit.

To implement the plan, Tom directed Torres to Accountants International, one of the authorized temporary agencies, in order to receive an assignment from the agency and return to the revenue unit to complete the work. Tom arranged with the agency to continue to pay Torres at her existing rate of pay. Tom believed that use of Torres as a contract employee did not violate the MOU because the department had a right to use outside temporary employees, and that by going to the temporary agency Torres would have created a break in service. Tom

did not consult with the UCSF human resources office as to whether this approach would legitimately avoid a default to career status.

Yarbrough told Torres she would return to the Coding Unit for eight weeks as an Accountants International employee and then return to the TEP pool. Torres followed the direction, worked her last day as a TEP employee on May 21; the next day she returned as an Accountants International employee performing the same tasks.

Torres' Grievances

On June 4, 2009, Yarbrough instructed Torres to train another employee in the functions of her position. On June 22, 2009, Torres, with representation by Paula Gustafson (counsel for Torres in this matter), filed a grievance alleging her entitlement to a career position based on exceeding the 1500 hour limit. At a grievance meeting on June 25 with Tom and Yarbrough, Torres was informed that her last day of work would be June 26, 2009. Tom testified that the employee Torres' trained was only a limited term employee, working two days per week. Torres did not claim Tom's order to train a replacement triggered the grievance, though that appeared to be the implication.

On July 6, 2009, UCSF's designated Step One grievance officer, Jocelyn Nakashige, responded to the grievance in writing. Nakashige asserted that Torres had completed her initial assignment helping the Coding Unit reduce its backlog and in early May 2009 began a different assignment providing general administrative support covering for an employee taking a maternity leave. Relying on the 1500-hours-rule language of serving in "any one assignment," Nakashige maintained Torres failed to qualify for a career position because she did not serve in the same assignment.

Torres appealed the denial to Step Two. The University's grievance officer at the Step Two level was Mark Gottas, a UCSF labor and employee relations policy coordinator. Gottas

reviewed the Step One response and held a grievance meeting with Torres, her CUE representative, and Gustafson. Yarbrough, Tom, and De Angelis attended for the University. No resolution arose from the meeting. Gottas, who described the meeting as unpleasant, recalled De Angelis conceding that Torres' Coding Unit position straddled the line between the II and III levels.

Following the meeting, Gottas investigated further with Yarbrough and De Angelis and learned that Torres' tasks had indeed changed from coding work related to reconciliation to updating data bases. However, Gottas did not find evidence to substantiate Nakashige's analysis of the case. Gottas understood that there was a decision to bring Torres back through the temporary agency. The department had intended to terminate Torres at some time because the assignment was not permanent, but accommodated Torres' request to stay on. Though it was unclear to Gottas whether Torres' work assignment was primarily coding or database work, Gottas ultimately concluded there was sufficient evidence of a default conversion under the language of Article 28's 1500 hour rule. He believed a remedy should be offered to resolve the grievance.

This did not resolve the grievance however. It was Torres' position that she was entitled to be placed in the position she had held in the Coding Unit. Gottas learned there was no such funded position in the Coding Unit. He also believed, consistent with his understanding of the University's practice, that Torres was only entitled to convert to a career position in the same department and in the classification in which she was last working. Gottas testified without contradiction that Torres' CUE representative agreed that nothing more was required by the express language of Article 28.

Gottas informed Torres of his position in an August 18, 2009 e-mail to Gustafson. He added that "[w]hat steps the department takes [beyond agreeing to find a career position] is

their decision and must be operationally supported." Torres responded that she believed restoration to her prior position was the appropriate remedy. Torres believed, based on statements she attributed to Yarbrough, that there was a funded position available in the Coding Unit.

After requesting two extensions of time to respond at Step Two, Gottas responded on October 20, 2009, with a formal offer of a remedy. The University would offer to convert Torres to career status effective May 22, 2009 in an administrative assistant III position. However that position would not be in the Coding Unit due to the absence of a permanent position there. Retirement service credit, benefits coverage and back pay retroactive to June 20 (the first work day following release from the temporary agency) were included.

Following Gottas' guidance, Tom identified a vacant position at the (__) assistant III level, the level at which she had last worked. Tom consulted with De Angelis, who was most familiar with Torres' work history. After reviewing the new job description, De Angelis informed Tom that Torres was capable of handling the new position.

By letter dated October 9, 2009, Tom informed Torres she had been appointed to a "(___) Administrative Assistant III" in the General Division of the Department of Pediatrics with a start date of October 26. A copy of the position's job description was included. The position provided direct administrative support to Dr. Michael Cabana, the chief of the division. According to the job description, two important areas of responsibility were retrieving articles from literature searches and formatting manuscripts using Microsoft Publisher. In addition, the incumbent served as an "administrative lead" or primary contact for Dr. Cabana, performing functions similar to an office manager. Although Torres may not have done literature searches before, Tom believed that with proper training Torres could perform

that and other functions of the position. On October 17, Torres appealed the grievance to Step Three, still demanding a position in the Coding Unit.

On October 26, Torres reported for an orientation with Dr. Cabana and two of his staff. Dr. Cabana had developed a detailed matrix for training, identifying other staff, including other administrative assistant IIIs responsible for each area. Dr. Cabana reported that the orientation went well. Torres reacted differently, doubting she was capable of handling the job. Soon thereafter it was reported to Tom that Torres was rejecting the position under the advice of Gustafson. Torres testified that the responsibilities of the position appeared daunting to her due to her lack of similar work experience, and particularly her weak skills in English grammar and punctuation. She had never composed letters or proofread them in a job.

Tom learned that Dr. Cabana had reached out to Torres to encourage her to accept the position. Tom sent a letter offering Torres more time to accept the position. Then, after Torres failed to report for payroll processing, the University considered Torres to have abandoned employment at the University.

When Torres objected to the proposed remedy, Gottas responded that Torres' refusal to accept the position and voluntary resignation would foreclose the Step Three appeal. This prompted Torres to file a second grievance on November 2, 2009, challenging the remedy. The second grievance caused Gottas to explore additional remedial options. Tom withheld action to process the voluntary resignation.

The Research Assistant Assignment

Gottas instructed Tom to identify the "next best position." By letter dated December 4, 2009, Tom offered Torres a research assistant III, position in pediatrics at the San Francisco General Hospital. The incumbent supported Dr. Delia Dempsey, a principal investigator in a

study on child metabolism.[4] Tom understood the position to require the gathering of patient data, doing in-home visits, telephone screening, and providing administrative support for the study. It was reported that Dr. Dempsey was not pleased with the prospect of Torres replacing the limited term employee already performing the work. But since the term of that employee was ending, the University was required to conduct an open recruitment if it wanted to continue the position. Jew instructed Tom to make sure a training plan was in place for Torres.

Torres testified that she met with Cathy Duran, the department's division administrator at the hospital. Duran explained the position to Torres. Torres found her pleasant. It was reported by Dr. Dempsey that Torres believed she could perform the job. According to Torres, however, Duran explained some of the more challenging aspects of the job. One of the responsibilities particularly worrisome to Torres was the requirement that she drive to other cities to collect urine and saliva samples from the study's participants. The homes were as far away as Discovery Bay and in low income East Bay neighborhoods. Travel could occur on weekends and during evening hours. Torres objected to the evening hour travel and driving on freeways, where she is not comfortable. She had also never served in a research assistant assignment before or collected bodily fluids.

Again, Torres, under advice of counsel, refused the position offered after one day. On December 11, Dr. Dempsey wrote to Torres in an e-mail: "You asked me to be honest. I want you to know that I had made plans for your training prior to your arrival and that I believe that with training you can be successful. After meeting you, I continue to hold the belief that you

[4] Although Torres made a point that she had never served as a research assistant, University witnesses established that a research assistant may perform administrative duties like other administrative assistants, and that if the position reports to a principal investigator, as opposed to an administrator, it will be described as a research assistant. Also, Tom initially chose the Cabana position because it had indefinite funding, whereas the Dempsey position, while also open at the time, did not have such funding.

have an opportunity to be successful in the role."[5] Tom wrote to Torres on December 17, explaining the University was treating her as having resigned her position. As a last resort, Gottas inquired into the availability of vacant positions at the (__) assistant I and II levels and was told there were none. Tom could not recall any request by Torres for a position at the I or II level (at least early on), but regardless testified there were no vacant position during that time period.

Torres testified she thereafter received only one placement offer from the TEP office, despite expressing interest in more assignments. She described that assignment as a "basic" administrative assistant III position. Torres believes she was blacklisted for filing her grievances.

ISSUE

Did the University discriminate against Torres by failing to offer her a career position in the Department of Pediatrics performing the same duties she performed as a temporary employee?

CONCLUSIONS OF LAW

The complaint alleges retaliation against Torres by the University for the protected activity of prosecuting the grievances regarding her termination from her floater position in the Department of Pediatrics. To prove this violation, Torres bears the initial burden of establishing a prima facie case that she engaged in protected activity, that the University knew of the activity, that the employer took an adverse action, and that the protected activity was a "motivating factor" in the University's decisions to impose the adverse action. (*California State University, Hayward* (1991) PERB Decision No. 869-H; *Novato Unified School District* (1982) PERB Decision No. 210.) Motivation may be proven by either direct or circumstantial

[5] Torres testified only to meeting Duran, not Dempsey.

evidence, or a combination of both. (*Carlsbad Unified School District* (1979) PERB Decision No. 89.)

Types of circumstantial evidence probative of unlawful intent include: (1) timing of the adverse action (*North Sacramento School District* (1982) PERB Decision No. 264); (2) inadequate, inconsistent, or shifting justification for the adverse action (*Novato Unified School District, supra,* PERB Decision No. 210); (3) disparate treatment of the employee (*Regents of the University of California* (1984) PERB Decision No. 403-H); (4) departure from standard procedures (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (5) cursory investigation (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); and (6) pattern of antagonism toward the union or individuals engaging in protected activity (*Cupertino Union Elementary School District* (1986) PERB Decision No. 572).

Once protected activity is established to be a motivating factor, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. (*Novato Unified School District, supra*, PERB Decision No. 210; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 730.) In dual-motive cases, the charging party retains the burden of proving a discriminatorily motivated decision by a preponderance of the evidence throughout the hearing. (*NLRB v. Transportation Management Corp.* (1983) 462 U.S. 393, 395, 401-402.)

Torres engaged in protected activity by filing the two grievances on June 18, and November 2, 2009. Presentation of grievances is protected under the HEERA. (Sec. 3567.) The University's decisionmakers in this case, Gottas and Tom, had knowledge of the grievances. The University concedes these two elements have been established.

Torres argues that the assignments offered as a remedy for the grievances constituted adverse action on the part of the University. She contends that both assignments included job requirements significantly more onerous than her position in the Coding Unit, and were in fact so onerous as to amount to a constructive discharge. The University disputes that claim.

Torres declined to accept both positions offered to her by the Department of Pediatrics resulting in the University ultimately treating her as abandoning her career appointment. Torres cites *Hacienda La Puente Unified School District* (1988) PERB Decision No. 685. In that case, PERB defined the elements of a retaliatory constructive discharge case: (1) the burden imposed upon the employee must cause, and be intended to cause, a change in the employee's working conditions so difficult or unpleasant as to force her to resign; and (2) the burden was imposed because of the employee's protected activities.

Torres did not actually perform in either of those positions proposed by Gottas in settlement of the grievance. Thus, the constructive discharge theory is inapplicable. PERB has held that the mere prospect of onerous work conditions or fear of retaliatory action is insufficient to demonstrate a constructive discharge. (*Visalia Unified School District* (2004) PERB Decision No. 1687, adopting administrative law judge's proposed decision at pp. 29-31; accord *State of California (Secretary of State)* (1990) PERB Decision No. 812-S.) In both instances, Torres refused the assignment because she assumed she could not perform the position, but without ever trying. In both cases, the supervisor had prepared a training plan in hopes of achieving a successful transition. The anticipatory nature of the refusal is confirmed by the fact that Torres appealed Gottas' decision on October 17, nine days before she reported to Dr. Cabana. At that time, her position was simply that she was entitled under the contract to continue in the Coding Unit position.

Torres also relies on *Fresno County Office of Education* (2004) PERB Decision No. 1674 to establish the offers constituted adverse action. In that case, PERB held that a transfer to a position with less favorable working conditions satisfies this adverse action element. The University argues the assignments were only adverse in terms of Torres' subjective view, where the standard requires a showing be made under an objective test. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) Here, the University offered Torres two positions that were career appointments at the same level of compensation. Torres believed, but offered no proof that there was a career position available in the Coding Unit or even a (__) assistant I or II available in the department. I find that the offers did not constitute adverse actions under the particular facts of this case because Torres had no reasonable expectation of continued employment in the Coding Unit. Even assuming that Yarbrough stated to Torres that if she continued working quietly a career position would become available, that statement does not establish a vacant funded position existed. Yarbrough may have hoped to obtain authorization for the funding of a permanent position in the Coding Unit, but the managers were discussing outsourcing the work and there was no evidence permanent funding was found. Also, Torres' original assignment was intended to help the coders become more current in their billing reconciliation work, but as they became more current, Yarbrough's justification for a permanent position, including using the (__) assistant III position to perform some routine coding work, would have lost traction. The claimed difficulty of performing higher level tasks in the proposed positions in comparison to the job duties of her temporary (__) assistant III position in the Coding Unit is simply immaterial in light of the absence of a vacant career position.

Even assuming the proposed positions imposed more onerous working conditions and therefore constituted adverse action, Torres fails to demonstrate that there is a nexus to her

protected activity. While the factor of close timing between the grievance filing and the offers of alternative positions is present to support an inference of retaliatory motive, no other factors are.

Citing the testimony of Morris and others, Torres suggests that the University's view that employees can be expected to acquire skills and move to a higher classification reveals discriminatory intent because the University has no policy of requiring the acquisition of new skills as a condition of continued employment, particularly in the clerical field. But this argument shifts the focus from the pertinent analysis of the departure-from-standard-procedure factor that arises from the facts of this case, namely, the practice of finding a vacant funded position. That practice was reasonable because appointment to a limited term position defeats the purpose of the career appointment. There is no evidence that Tom concluded in bad faith that Torres was capable of performing in either of the positions based on her employment record and the offers of training and support. There is no evidence she chose those positions over others with which Torres may have been more comfortable. Tom did not learn of Torres' lack of confidence until it was reported to her by Drs. Cabana and Dempsey.

Torres failed to demonstrate that the University's practice of limiting the search for available career positions to vacancies in the department to which the employee was last assigned constitutes a departure from standard procedure.[6] She also failed to demonstrate that the University's practice of offering the same level (__) assistant position that was occupied at the time the entitlement was triggered constitutes a departure from standard procedure.

There is no evidence of a shifting justification despite Gottas offering a different analysis in responding at Step Two of the grievance than was offered at Step One. That is so

[6] In the context of the TEP pool within the University, the delegation of human resources responsibility to the departments, and the departments' financial autonomy, it is logical for the department that requests the floater and then fails to avoid the 1500 hour limit to be responsible for correcting the oversight pursuant to the MOU's conversion rule.

because Gottas chose to concede a possible violation where the University had denied it in the first instance.

Finally, while it is true that Torres may have believed, consistent with the TEP practice, that she was entitled to reject an appointment she did not believe she could successfully complete, she was not being offered a temporary assignment. Rather the University was attempting to place Torres in an equivalent career position because there was no funded position in the Coding Unit.[7] Gottas' decision to deviate from the first level response, offer a remedy in the form of the Cabana position, and then offer the Dempsey position to resolve the second grievance shows respect for the grievance rights of Torres rather than animus toward them.

For all the foregoing reasons, I find that Torres has failed to establish that the University's two offers of (__) assistant III positions as a proposed remedy for the alleged contract violation constitutes discrimination or retaliation for her filing grievances.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the complaint and underlying unfair practice charge in Case No. SF-CE-939-H, *Melinda Torres v. Regents of the University of California*, are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself within 20 days of service of this Decision. The Board's address is:

[7] Gottas testified that any employee in a career position for which funding has ceased could be laid off, without regard to the TEP conversion rule. In some prior instances of conversion, a layoff had ensued.

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subd. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)

Donn Ginoza
Administrative Law Judge